United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

70

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,530

UNITED STATES OF AMERICA

V.

BENTLEY W. DENNIS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Cases and other authorities relied upon are marked with an asterisk.

In the opinion of appellant, the following issues are presented:

1. Whether it was reversible error for the Trial Court to have refused to admit testimony of a third person's declaration against interest statement that he and not the defendant had committed the robberies.

2. Whether the taking and use of individual pictures of defendant prior to lineup identification without presence of counsel and without being advised of his rights denied him due process.

This case has not previously been before this Court under the same of other name or title.

REFERENCES TO RULINGS

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,530

UNITED STATES OF AMERICA

V.

BENTLEY W. DENNIS

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

1. STATEMENT AS TO PROCEEDINGS

On December 16, 1969, a five count indictment was returned against the defendant, Bentley W. Dennis. In the first count he was charged with robbing William Fair on August 9, 1969, while armed with a dangerous weapon. The second count, involving the same indictment, charged him with robbery by force and violence. The third count, with respect to the August 9th robbery, charged him with assault with a dangerous weapon, a pistol. The fourth count charged the defendant with assault on William Fair on September 11, 1969, with a dangerous weapon. The statutes alleged to be violated were: 22 D. C. Code 2901, 3202, 502 and 501. Pleadings.

An attorney was appointed by the Court for the defendant and a plea of not guilty interposed. Pleadings.

Trial was had before a jury on April 1 and 2, 1970. Count five was dismissed by the Court without prejudice. Verdict was not required on Count Two. There was a verdict of guilty on counts one, three and four. He was sentenced to a term of not less than one year and not more than four yeats. Pleadings.

2. FACTS:

a. Mr. Fair

The complaining witness, Mr. Fair, testified that on August 9, 1969, about 3 A. M., while on his way home from a friend's house where he had had ten drinks of scotch, he was approached from the right hand side at Maryland Avenue and 21st Street, N. E. by two persons. Tr. 23-24, 66, 79. One fellow, who, Mr. Fair said, was the defendant, asked for his money and struggled with him. The other one, he testified, came up to him with a gun, stuck it into his stomach and told him to stand still. The first one went through Mr. Fair's pockets, took money out of his wallet, took $10 to $15 from him and asked him why he did not have more. Mr. Fair replied that he did not carry money with him. Tr. 24, 32, 39. He said he was ordered by the man with the gun to start down the hill and he started down Maryland Avenue, but the two started to run away and Mr. Fair went on home. Tr. 24.

Mr. Fair testified that the next morning he called the police but no one came for a report so he forgot about it. Tr. 24, 68.

He said that the defendant robbed him again on September 11, 1969 in the basement laundry room of 1825 Maryland Avenue. He said Mr. Dennis went through his pockets but he did not have any money. Tr. 27. The robber then left. Tr. 28

Mr. Fair said that the first robbery took about 15 minutes, Tr. 29,and at the second incident the robber was there about 5 to 8 minutes. Tr. 28.

Mr. Fair was asked if he saw in the courtroom either of the two men who had approached him and he identified Mr. Dennis as one of them. Tr. 25. With respect to the first robbery, he testified that the defendant had come f from the rear and grabbed him from the right side. He said it was light enough for him to recognize the defendant. It was getting to be daylight, the street light was in the middle of the street and the robbery took place about the middle of the street and the light was on the same side of the street that the robbery took place. Tr. 28-29. With respect to the second robbery, he said the lighting was good enough for him to recognize the hold up man. Tr. 28. He had had two or three drinks prior to the robbery that day. Tr. 76.

He testified that at the first robbery, defendant wore a shirt and a pair of trousers and he thought that the second time defendant wore a car coat, sun shade, no hat and had a little more hair on his head. Tr. 29-30, 69-70, 71, 73. He said both robbers had mustaches. Tr. 30.

Mr. Fair said that he had no question as to the defendant because he had seen him a second time. Tr. 72. He testified that he was asked to attend a line-up and he picked out the defendant. Tr. 31.

Mr. Fair stated that when he came out of the building there were two men who had seen a car and got the license number and Detective Thompson picked up the defendant through his car, and Mr. Fair picked out his picture from the pictures Mr. Thompson showed him, Detective Thompson requested it. Tr. 74. Mr. Fair said that after the second hold up, after he went home, he called the police and gave them a description of Mr. Dennis: close to five feet ten, possibly 160 pounds. Tr. 78. He said he had not known Mr. Dennis prior to the August robbery. Tr. 78, 136.

b. Bentley W. Dennis

Mr. Dennis testified that he was living at home with his parents. Tr. 83. Mr. Dennis testified he was now employed at a Woolworth's store, but

that in August 1969 he was working at the Washington Gas Light Company. Tr. 82. According to information supplied in connection with determination of conditions of release, Mr. Dennis had worked for the Washington Gas Light Company for 1½ years, and had left because of loss of driver's permit. He had no prior convictions and no other pending charges. Pleading File. Mr. Dennis testified that he had had a driver's license which had been suspended the last week in August or early in September, and that thereafter he did not drive his car. Tr. 87. His brother drove it at times, as did Mr. Green. Tr. 87. Sometimes his brother borrowed it for a day or two. Tr. 87.

Mr. Dennis testified that on August 8, 1969, which was a Friday, he left work after 4 P.M. after getting paid. He got some parts for his car, went home and worked on his car in front of his house until late in the evening. He said he then went into the house and was there until the next morning. Tr. 83, 115-116,117, 118-119. His parents were there in the evening and when he went into the house he watched TV. Tr. 83. He went to work the next morning about 7 A.M. Tr. 98-99, waking up about 6:30. He had gone to bed around 12 o'clock. Tr. 83,99.

He testified that he never had had a pistol. Tr. 83.

He testified that he did not know where his brother was on August 9; his brother was not home with him. Tr. 88, 100. He identified a photograph as the photograph of his brother, Charles. Tr. 90. Apparently, that was the photograph Mr. Fair had previously identified. Tr. 95.

With respect to September 11, he testified that the day before he had been asked to go to a Miss Ellen Munderay on Eye Street, N. E. to wash and wax her floors and help with laundry. He was there from about ten until 2:30. He did this work with a friend, Noel Green. Tr. 84, 85. When he left for work that day his car was parked in front of his house. Tr. 107, 108. She lived about five or six blocks from his house, had the equipment

at her house and he had walked over to her house. Tr. 87, 88, 92. He said that after finishing working that day he was out on the street until late in the evening. Tr. 107. His brother had used his car that day. Tr. 107.

Mr. Dennis testified that Mr. Fair lived in the same apartment house as did Mr. Green. Tr. 93. He said that he had seen Mr. Fair a number of times at Noel Green's place. Tr. 84, 85, 92, 95. He testified that it was at Mr. Green's house that he had learned that Mr. Fair had recognized his car because Mr. Fair had said something about it to Mr. Green's mother. Tr. 86, 94.

He testified that about two months after the robbery an officer had come to his parents' house, asked for him and said his car had been involved in a robbery. Tr. 104. The officer had left word for him to come downtown to talk about some charges. Mr. Dennis called the officer and went downtown unaccompanied by anyone. Tr. 109. There they took his picture, he not objecting. Tr. 104. His picture was taken on September 27, 1969 and October 2, 1969. Tr. 110, 113, 164, Exhs. 2, 3,. Mr. Dennis testified that he went to the police station on several occasions; each time they took snapshots of him. Tr. 111. The last time he went there he was arrested. At that time he was accompanied by Noel Green, a friend. Tr. 112.

Mr. Eugene Carrington Dennis, senior, the defendant's father, next testified. He had not heard his son testify. Tr. 122-123. Mr. Dennis, Senior was retired at the time of the two incidents. Tr. 140.

He testified that prior to August 7, 1969, his wife had been in New York, visiting relatives, and Mr. Bentley Dennis was at the house that week. Tr. 124. Around that time the defendant had had an accident with his car and he was working the evening of the 8th on the car. Tr. 124. He testified that his wife came back from New York on the 7th or 8th of August. Tr. 124. His son, Bentley, worked on his car for about three days around the 7th. Tr. 124-125, 127-128, 132. He could remember his son working on the car about then

because that was around the time his wife came home from New York, and Bentley talked to his mother about her trip. Tr. 128-129. There was a large TV downstairs which Bentley would watch. Tr. 125. He said that his son, Bentley, had a small TV in his room which worked on and off. Tr. 125. Mr. Dennis, Senior, stays up late watching TV and doing chores. Tr. 126.

Mr. Dennis, Senior, testified that their door system was so arranged with safety chains and locks, so that if Bentley left the house his father would know it. Tr. 126.

He testified that his other son had a pistol. Tr. 126.

Lucille Dennis, mother of Bentley W. Dennis, testified that she had taken a trip in August and returned about the 7th or 8th. Tr. 137-138. On Friday evening Bentley was working on his car, and later watched television. She was quite sure he went to bed; he could have left the house but they did not hear him. Tr. 141. As far as they knew he did not leave the building that night. Tr. 140-141. She said that she had watched late devotional shows on TV and had gone to bed about a quarter to two that night. Tr. 141. She said that her son, Charles, had passed away on October 13, 1969. Tr. 139.

The death certificate for Charles lists the cause of death as suicide. Def. Exh. 2.

Mr. Noel Michael Green testified that he lived with his mother and a brother in the same apartment house as Mr. Fair. His mother and Mr. Fair were friends. Tr. 142. Mr. Fair had come to their apartment a number of times, as had Mr. Dennis. And Mr. Fair on two or three occasions has been at their apartment when Mr. Dennis was there. This was so within the last six months. Tr. 143.

He testified that on September 11, 1969, he was over at Mrs. Munderay's home that morning until after the kids had gotten out of school. He had left his house to go there between 9:30 and 10 A.M. He had gone there to help wax floors, wash windows, etc. He had walked the block or block and a half between his house and that of Mrs. Munderay. Mr. Dennis went with him to Mrs. Munderay's. Tr. 143-144. He said he was a friend of the defendant's. Tr. 145.

Mr. Green remembered the date because Mr. Fair had asked him whether he knew a guy with a red convertible, and asked about Bentley. Tr. 147. That was sometime from a day to a week after the robbery after the robbery. Tr. 148-149. He denied telling Detective Thompson that they had been driving around all day on September 11. Tr. 149-150.

Ellen Munderay testified that she lived at 2109 Eye Street, Northeast, Apartment 3. She knew Mr. Dennis a long time. Tr. 151.

She testified that on September 11, 1969, the defendant and Noel Green were supposed to be at her apartment at 9 A.M. to do her floors but they were between an hour and an hour and a half late. Tr. 152. She believes they walked over to her place because it is only a five minute walk, and she did not see a car parked in front of her apartment that day. Tr. 152-153. She said they left about 3 P.M. They not only helped on her floors but they also took clothes down to a nearby laundry. Tr. 153.

Mrs. Mundery remembered September 11, because that was clinic day for the children September 10, Bentley had come to her apartment about a suit she had filed on the same charges he had with respect to a store and while at her place he had called Food and Drug. Tr. 153

On cross-examination, the only question she was asked was if she had been asked to come and testify. She responded that about a week ago she had asked to testify by Mr. Dennis and then she had made an effort to remember what had happened on September 11. Tr. 154-155.

Sarah Russell testified that she lived at 1909 Maryland Avenue, Northeast, Apartment 3. She said that she had known Mr. Dennis for a couple of years. Tr. 155. She had also known Mr. Fair for two or three years. She said that Mr. Dennis had come to her apartment from time to time to visit her and her son, and Mr. Fair also came to her apartment. She did not know whether the two had ever been there together, but that it could have been possible because a lot of the boys came there. Tr. 155-156. She did not think Mr. Fair knew Mr. Dennis personally, but he might have seen him in her apartment. Tr. 157.

Mr. Ford, a minister, testified that he had known Bentley Dennis for nearly 11 years. He testified that the defendant had a good reputation in his neighborhood and the church community, and a good reputation for peacefulness. Tr. 157-158.

Detective Thompson testified that exhibits 2 and 3 were photographs of the defendant sitting out there with the defense attorney. Tr. 164. He said that one was taken on October 2, 1969, and the other on September 27, 1969. He said he took the one on the 27th and one of his coworkers took the other on the 2nd. Tr. 164.

He said that the September 27th photograph was taken at the Robbery Squad office of the Metropolitan Police. Detective Thompson had called Mr. Dennis the previous day and asked him to come to the office and he had come. Tr. 165. Detective Thompson testified that he had a discussion with Mr. Dennis. He spoke of a robbery in which Mr. Dennis's car was supposedly involved, that he had a complaint against him and asked him whether he had anything to say about the defense, his whereabouts and that he could say anything he liked. Tr. 165. He said he even showed Mr. Dennis a copy of the offense report which gave the tag number of his car. Tr. 166.

Detective Thompson testified that Mr. Dennis said he had no knowledge of the offense, and that on September 11, he was in the company of a Mr. Green most of the day, but he could not tell where, but that he remembered shooting pool somewhere on Benning Road that day. Tr. 166.

He stated that on the 27th, Mr. Dennis came by himself. Tr. 166.

Detective Thompson testified that on October 2, 1969, Mr. Dennis came with Mr. Green and was placed under arrest and was given a rights card to read. Tr. 167. He said that Mr. Dennis again denied the offense and said he shot pool on Benning Road with Mr. Green on September 11. He testified that Mr. Green had told him that he had driven Mr. Dennis' dar that day and could not give any place they had been except for a pool room, Tr. 168-169. He testified that both said they were together that day but could not say where they were at 11 A.M. that day. Tr. 169.

Detective Thompson said that after the arrest, there was a lineup, at which Mr. Fair was present. Government's Exhibit 1,he said, was a picture of that lineup. Tr. 169-170.

Voir Dire Testimony

Although the trial Court, at the outset, was of the opinion that evidence that another person, deceased at the time of trial, had admitted to have committed the crime was inadmissible, Tr. 13,16, out of an abundance of caution he permitted a voire dire hearing, after which he affirmed his ruling. Tr. 61, 62, 39.

Mr. Bentley W. Dennis testified he had a brother, Charles R. Dennis. This brother had not lived with him, but came over from time to time. In the evening of the day of the second robbery or the day after, according to Mr. Dennis, his brother came over and told him he had something on his mind: that he was the one who committed the crimes. Tr. 38-40. Appellant stated that his brother had a gun; that appellant had lost his permit to drive at the end of August or early September and that his

was using his car. Tr. 41-42. Mr. Dennis stated that his brother had said that the laundromat robbery had taken about a minute. Tr. 42.

Charles R. Dennis died, apparently through suicide, on October 11 or 13. Tr. 43, 51, 52. Appellant said that the last time he had seen his brother was two or more weeks before his death. Tr. 44.

(After government counsel had withdrawn his objection to this line of testimony, Tr. 45-46, the Court allowed other members of the Dennis family to testify).

Mr. Dennis, father of the appellant, testified that he was a retired government worker. He said that he had a son, Charles Robert Dennis. Tr. 49. He stated that in the latter part of August Charles seemed like his health was broken and moved over to his father's house. T. 49. In the latter part of August, he told his father that his brother had been accused of a misdemeanor, that his brother did not do that misdemeanor, that he did it himself. Tr. 50. The father testified Charles made the statement after his brother was confined, that his brother did not commit the crime. Tr. 50, 51. The father said that at the time Charles made the statement to his father, he was sickly and looked like he had a lot on his mind, and he brought the cinversation up again just before his death. He seemed as if he wanted to get it off his conscience. Tr. 50-51.

The mother, Lucille Jordan Dennis, stated that her son, Charles Dennis, about October 10, told her he was sorry that his brother, Bentley, was in the D. C. jail on account of a robbery he, Charles, had committed. Tr. 53.

Carrol A. Dennis, wife of Charles Dennis, testified she had been working as a secretary for the Treasury Department for almost four years. Tr. 54-55. She testified that right after his brother was arrested, her

husband told her it was he who had robbed Mr. Fair and that he felt bad that his brother had been charged with something that was her husband's fault. Tr. 55. She said that about a week before his death he wanted to go down to the police and give himself up because he did not think it was right for his brother to be down there, but he did not go down there. Tr. 56.

ARGUMENT

1. Failure to allow testimony that another person had admitted to committing the crimes charged to appellant was substantial and reversible error

Appellant had two primary defenses against the charges of the indictment. One was an alibi and the trial court admitted evidence as to this defense. The other primary defense was proof that another person had committed the crimes charged to the defendant. Evidence of this was offered through testimony that the third person had so admitted. The trial court refused to allow evidence as to this defense to go to the jury. See supra pp 9, 10.

Early in the trial, counsel for the defendant advised the Court that he proposed to show that another person, who had died prior to the trial, had said that he and not Bentley W. Davis had committed the crimes with which the latter had been charged.

The trial court expressed the opinion that the rules of evidence did not permit evidence of this sort. Counsel for defendant admitted he was unprepared on this issue and that he did not have authorities to support his position that testimony as to such admission was admissible. Tr. 11, 13, 15-16, 17, 18. The Court gave counsel time during the recess to come up with authorities, but counsel returned with a reference only to a case not dealing with this specific issue. Tr. 34.

The Court, nevertheless, let counsel start a voir dire with Bentley

W. Dennis as a witness. Mr. Dennis testified that his brother, Charles Dennis, had told him that it was Charles who had committed the crimes and not Bentley. Charles Dennis was not available at the trial because he had committed suicide in October 1969. See supra p.10.

After Bentley Dennis had completed his testimony on voir dire, the prosecuting attorney withdrew his objection to this line of testimony. Tr. 45. Thereafter, the father of the defendant, the mother of the defendant, and the brother's widow testified that Charles Dennis had made the same admission to each of them. See supra pp.10-11. After this testimony on voir dire the prosecuting attorney changed his mind and objected to all of this line of testimony. His objection was upheld. Tr. 58-62.

A well established rule of evidence has been that a declaration against pecuniary or property interests is admissible even though at the time of the trial the declarant was dead. Early in the 19th century an English Court took the view that this exception to the hearsay rule did not apply to declarations where the declaration was against the declarant's interest not to be subjected to criminal prosecution.

This exception to the exception was followed in the United States without attention being paid to the rationale of the rule. In Donnelly v. United States, 228 U. S. 243(1913), the Supreme Court, being of the opinion that this was the established rule, excluded such evidence. The effect of this exclusionary rule was to assume that one was more likely to tell the truth if his declaration might cost him money than if his declaration might cost him his freedom.

Commentators have been quite critical of this exception from the declaration against interest rule. 5 Wigmore on Evidence §1476, 1477; McCormick, Evidence,549-553; 5 Tulane L. J. 302 (1964). In recent years, the distinct trend has been away from this exclusionary exception. See Model Code of Evidence - Rule 509: Declaration Against Interest; Uniform

Rules of Evidence 63(10); People v. Spriggs, 60 Cal. 2d 868, 389 P 2d, 377 (1964); People v. Brown, 26 N. Y. 2d 88, 257 N. E. 16 (1970).

Not only does it seem quite likely that the Supreme Court would not follow its 1913 decision, but, also some lower federal courts have indicated that they would consider a declaration against criminal interest part of the declaration of interest rule. See Mason v. United States, 257 F. 2d 359, 360 (10th Cir. 1958). And at least one case has expressed the thought that the Donnelly case was merely the product of its time. Thomas v. State, 186 Md. 446, 47 A 2d 43, 45-46 (1946).

Exclusion of the voir dire evidence is particularly disturbing in this case. All that tied the appellant to the alleged crimes was identification testimony. And there were disturbing circumstances surrounding this testimony by Mr. Fair. In the first instance, Mr. Fair connected the appellant with the robberies only after Mr. Fair had learned that Mr. Dennis's car had driven away from the apartment house after Mr. Fair had been robbed in the laundryroom there. Tr. 73-75, 85-86. Yet, Mr. Dennis had testified that his driving license had been suspended several weeks before this time, that he did not drive his car and his brother had been using it. Tr. 86-86, 104, 106-107.

Again, we find that Mr. Fair, after learning about the car ownership, had been shown a picture of the defendant prior to any lineup identification. Tr. 74

Finally, we find that with respect to the first robbery, it had been preceded by such heavy drinking on the part of Mr. Fair that his identification of the late-at-night robbery cannot help being suspect. See supra p. 2 . Mr. Fair's testimony that the first robbery of about $10 to $15 took about 15 minutes and then they ran away, Tr. 29, 32, and the second robbery, where nothing was taken, took about 5 to 8 minutes, Tr. 28, 73, is simply not believable.

In addition, there is a disturbing lack of logic in tying Mr. Dennis to these robberies. Not only was there no showing of motivation toward robbery, but all the circumstances suggest the contrary. The evidence shows that Mr. Dennis had been regularly employed for a considerable period of time. Tr. 82, and Pleading File. There was no proof or suggestion that he was an addict. There was proof that he had known Mr. Fair prior to the robberies, supra p. 5. And yet, he was accused of robbing such man twice without any mask. That the same man (a person with a job) would rob the same man a second time after the first robbery netted only about $10 to $15, and the victim had said he did not carry money with him, Tr. 24, 26, makes little sense.

Because of the tight briefing schedule, we propose here to deal with arguments against admissibility of the voir dire testimony.

It may be said that since those through whom the admission was sought to be introduced were relatives of the defendant, their testimony is not reliable enough to be admitted. Under this theory, however, any favorable testimony by a relative would be inadmissible. Since this might mean that a defendant might be without the only favorable evidence available to him, and since this would put relatives in a special class of evidentiary pariahs, since they are subject to cross examination, the law, with good sense, permits such testimony, the matter of credibility being for the jury. So here, we submit that such testimony by relatives who are subject to cross examination should be admitted and their credibility should be a matter for the jury. We point out, moreover, that the most likely persons to whom such admission might be made are close relatives.

Again, it might be argued that since Charles Dennis, the declarant,

was the brother of the appellant, his admission should be excluded, but this argument is essentially the same as the one which would exclude any testimony by a relative. Here, also, the question should be one of credibility, not one of admissibility. That he is not present for cross examination is true of all such declarants. And that, of course, is a factor to be considered by a jury. But to exclude from a jury's consideration exonerating testimony merely because the exonerator is a dead relative is to deny defendant a fair trial by jury. And see 18 U. S. C. 3502.

2. The Circumstances of Identification were such as to require a prior hearing as to propriety before admissibility

There are very disturbing circumstances surrounding the identification process in this case, which, we submit, under the authorities, require that a preliminary hearing be held as to what, if any, of the identification process used in this case was admissible. United States v. Wade, 388 U. S. 218; Gilbert v. United States, 388 U. S. 218; Clemons v. United States, 133 U. S. App. D.C. 27, 408 F. 2d 1230(1968); United States v. Zeiler, 427 F. 2d 1305 (1970); Commonwealth v. Whitney, 439 Pa. 205, 266 A. 2d 738 (1970), cert. den. 91 Sup. Ct. 173(1970).

First, we may be met with the argument that the prosecuting attorney asked defendant's attorney whether he wanted a "Wade hearing" and counsel declined to ask for one. While we doubt that the conduct of defendant's trial attorney was so incompetent as in itself to warrant a new trial, we submit that his representation of the defendant was so demonstrably weak as to merit this Court's consideration of this point as a matter of elementary fairness to the appellant, who did not select his counsel. We think the quoted references from the record set forth below speak for themselves.[1/]

As we have noted in the preceding part of the argument, the identification process started with Mr. Fair's awareness that a car apparently used in the second robbery was owned by defendant. Next, we find that

Detective Thompson took pictures of Mr. Dennis on two different occasions, once before he was arrested and once at the time he was arrested. Tr. 164. Detective Thompson first testified that counsel for defendant was present when these pictures were taken. Tr. 164. This is inconsistent with the fact that counsel, as the pleading file shows, was not appointed until after defendant had been arrested. Moreover, in another part of his testimony, Detective Thompson said that on the first occasion Mr. Dennis came to his office alone, and on the second occasion came with his friend, Mr. Green. Tr. 165-167. And this was the testimony of Mr Dennis. Tr. 109-110, 112. It seems clear that these pictures were taken outside the presence of counsel. It is also clear that prior to any lineup identification, Mr. Fair was shown at least one of such pictures along with other pictures. Tr. 73-75. The record is silent as to anything concerning the nature of such other pictures. Tr. 73-74. There is nothing in the record to show Mr. Dennis was warned of his legal rights before his pictures were taken..

Only after all of this was there a lineup identification followed by courtroom identification. We submit under the circumsstances a hearing should be had as to what picture or pictures were looked at by Mr. Fair prior to the lineup identification and whether the circumstances were such as to have tainted subsequent identifications.

Conclusion

For the foregoing reasons, appellant respectfully asks that judgment be entered in his favor or, alternatively, that this cause be remanded with instructions.

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1. "But I was under the impression you could introduce a statement, didn't realize why it wouldn't be admissible, because a statement could be made, the fact of the statement, the objection you are trying to slip in something, but that could be something that the Court would rule on." Tr. 11.

1. (cont'd)

"I am wondering how I am going to be able to get in the fact that the son confessed." Tr. 13.

"I just feel that there is some way that the fact that the statement was made can be gotten in." Tr. 15.

"The Court: Mr. Black, how long have you been a member of the Bar?
Mr. Black: Since 1953.
The Court: That is what I thought.
Mr. Black: But I don't consider myself an experienced criminal lawyer. I was more involved in real estate, and civil practice" Tr. 16-17.

"The Court: Do you have any cases that say you can?
Mr. Black: No, Your Honor. Frankly, I didn't realize that I was unaware of the law." Tr. 17.

Mr. Black acknowledged he "was newvous and distraught". Tr. 19.

"Mr. Black: I can't lay my hands on any particular law but I just feel it is wrong to exclude it." Tr. 59.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

v.

BENTLEY W. DENNIS, *Appellant.*

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN S. RANSOM,
Assistant United States Attorneys.

Cr. No. 1947-69

INDEX

TABLE OF CASES

OTHER REFERENCES

---

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred by excluding the alleged confessions of appellant's deceased brother made to relatives of both parties that he and not appellant had committed the crimes.

II. Whether the trial court erred by not holding an identification hearing *sua sponte* prior to trial where appellant expressly denied the necessity of such a hearing.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,530

UNITED STATES OF AMERICA, *Appellee,*

v.

BENTLEY W. DENNIS, *Appellant.*

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a five-count indictment filed December 16, 1969, appellant was charged with armed robbery, robbery, and assault with a dangerous weapon (22 D.C. Code §§ 2901, 3202, 502), allegedly occurring on August 9, 1969, and assault with intent to commit robbery and assault with a dangerous weapon (22 D.C. Code §§ 501, 502), allegedly occurring on September 11, 1969. After a trial on April 1 and 2, 1970, before the Honorable June L. Green and a jury, appellant was found guilty.[1] On July 14, 1970, appellant was sentenced

[1] Appellant was found guilty of armed robbery and assault with a dangerous weapon as charged in counts 1 and 3 of the indictment; no verdict was rendered on the robbery count (count 2) since a guilty verdict was rendered on count 1. Appellant was also found guilty of assault with intent to commit robbery as charged in count 4; the jury did not render a verdict on count 5, and the trial court *sua sponte* dismissed that count after the verdict was returned on the other counts.

to a term of imprisonment for not less than one year nor more than four years. This appeal followed.

William H. Fair testified that at about 3:00 a.m. on August 9, 1969, while in the vicinity of 21st Street and Maryland Avenue, N.E., he was approached from his right side by an individual who demanded his money. A struggle ensued which was immediately terminated by the arrival of a second man, who placed a gun in Mr. Fair's stomach and advised him to remain still. The first assailant then proceeded to search Mr. Fair's pockets and removed his wallet, containing approximately $10 to $15 (Tr. 23-24, 32). After the completion of the robbery, Mr. Fair was advised by the second assailant to return in the direction from which he had come, and as he proceeded back down Maryland Avenue, the robbers ran in the opposite direction (Tr. 24). The following morning, Mr. Fair testified, he called the police department, but no one responded to take a report, and Mr. Fair dismissed the incident (Tr. 24).

Mr. Fair identified appellant in court as the first robber, *i.e.*, the one without the gun who took his money. He additionally stated that at the time of the robbery the lighting was very good, since dawn was breaking, and the robbery itself took place beneath a street light. The offense took as long as fifteen minutes, during which time Mr. Fair observed the two robbers, both of whom spoke to him (Tr. 26, 28-29).

On September 11, 1969, at approximately 11:00 a.m., while Mr. Fair was in a laundromat at 1825 Maryland Avenue, N.E., appellant entered with a gun and demanded his money. After thoroughly searching Mr. Fair and obtaining no money, appellant departed. This attempted robbery lasted between five and eight minutes and took place in a well-illuminated room (Tr. 27-28). Mr. Fair thereafter identified Government Exhibit No. 1, a photograph of a lineup which he attended, and testified that he identified the man with No. 4 upon his chest. That man was appel-

lant.[2] Thereafter the Government moved Exhibit No. 1 into evidence without objection (Tr. 31-32).

On cross-examination Mr. Fair testified that prior to the robbery on August 9, 1969, he had been visiting with friends at their house, where he had consumed approximately ten drinks of Scotch whiskey (Tr. 66, 79). When asked about the possibility of his having been intoxicated, Mr. Fair replied that he was not too intoxicated to go home since, if he had been, he would have spent the night with his friends. He further stated that his vision was not impaired and that the second encounter "gave my vision just that more of a chance to recollect itself" (Tr. 72). Defendant's Exhibit No. 1-A, a picture of appellant's deceased brother, was proffered to Mr. Fair for purposes of identification.[3] Mr. Fair stated that he had previously seen the man in the picture, and on further questioning he testified that that man was the second robber, along with appellant, on August 9. He denied that appellant's brother was the individual who assaulted him on September 11, but rather maintained that the only time he saw him was on August 9 in the company of appellant (Tr. 67-68).

Mr. Fair testified that after the September 11 encounter, two individuals standing outside the laundromat saw appel-

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[2] Prior to trial, the prosecutor related to the court that at the request of Metropolitan Police Detective Steve M. Thompson appellant had come voluntarily to the police station to discuss the offenses committed upon Mr. Fair and that there his photograph had been taken. Later Detective Thompson took appellant's picture and a number of others to Mr. Fair, who identified appellant from the group of photographs as one of the robbers. Thereafter appellant was identified at the lineup by Mr. Fair (Tr. 12). The question of an identification hearing was discussed by both counsel before the court, and appellant's counsel determined that there was no necessity for a hearing on the identification procedures (Tr. 20).

[3] Appellant's defense, in part, was based on an alleged confession that his brother, whose picture was exhibited to the complainant, had made to their mother and father, appellant, and the brother's wife some time after the second incident, in which he stated that he had committed the crimes for which appellant was charged. Very shortly thereafter the brother committed suicide. The trial court, after an evidentiary hearing and extensive oral argument outside the presence of the jury, excluded the alleged confession as hearsay (Tr. 3-21, 34-65).

lant enter a car and leave. Mr. Fair was given the license number of the automobile, which he in turn gave to the police (Tr. 74). He further testified that prior to going to the laundromat he had had two or three drinks (Tr. 75-76). In response to counsel's questions, Mr. Fair stated that he gave a description of appellant to the police, which he recited, and said that he had never seen appellant prior to the August 9 incident (Tr. 78). After ascertaining on redirect examination that the complainant had been drinking Scotch whiskey prior to the August 9 robbery, the Government rested its case (Tr. 79). The trial court then denied appellant's motion for judgment of acquittal (Tr. 80).

Appellant testified on his own behalf. He stated that he left work at the end of the day being paid and purchased a number of parts for his automobile, upon which he worked until late in the evening on Friday.[4] Upon terminating his work upon the automobile, appellant entered the house at about 9:30 or 10:00 p.m. and remained at home with his parents until the following morning after 9:00 o'clock (Tr. 82-83). On September 11, appellant stated, he was waxing floors for Mrs. Ellen Munderay with Noel Green during the period that the offense occurred. He testified that Mr. Green lived in the same apartment building as Mr. Fair, and that he had seen Mr. Fair on numerous occasions in Mr. Green's apartment visiting with Mr. Green's mother (Tr. 84-86).[5]

Appellant further testified that on one occasion he was informed by Mr. Green's mother that Mr. Fair had recog-

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[4] Appellant's testimony concerning the date of August 9 became somewhat confused as the trial went on. On direct examination he testified that on August 9, a Friday, he left work and went home, worked on his car, and thereafter went to bed (Tr. 82). On cross-examination, when asked about what he was doing on August 8, the preceding evening, appellant replied that he was doing nothing (Tr. 97). On redirect examination, appellant's counsel established that August 8 was a Friday and August 9 a Saturday, and appellant again stated his alibi, though expressly utilizing the date of August 8 (Tr. 116-117).

[5] Mr. Green's mother later testified that Fair had visited her on occasion, but she could not recall whether he might have seen appellant there (Tr. 155-157).

nized his car as the one that was involved in the September 11 incident. Appellant, however, stated that he was not involved since he lost his license before Labor Day. After that he did not drive his car, although Mr. Green drove it on occasion, and his brother, now deceased, was permitted to use it at any time and had complete access to it (Tr. 86-87).

On cross-examination appellant testified that he did not own a pistol. When asked if he knew whether or not his late brother Charles owned a pistol, appellant replied, "He told me he stuck the man up, so I guess he did have a pistol" (Tr. 101).[6] Initially, when asked about the location of his car on September 11, appellant stated that his car was parked in front of his mother's house (Tr. 92); but thereafter, when asked what he told his father after knowledge of the incident came to be known within the family, appellant stated, "I told him that my brother had had my car and I told him about what my brother had told me" (Tr. 106). When pressed concerning the obvious discrepancy, appellant chose to state that his brother had the car on September 11 (Tr. 107), but thereafter he said that when he left to perform the cleaning job for Mrs. Munderay, his car was parked in front of his house (Tr. 107), and when he returned home later in the evening, his car was "back" (Tr. 108).

Appellant thereafter identified Government Exhibits Nos. 2 and 3 as photographs taken of him at the police station on October 2 and September 27, respectively. Appellant testified that his first appearance at the police station was made of his own free will at the request of the police. No one accompanied him on that occasion. His second appearance, which resulted in his arrest, was made in the company of Mr. Green (Tr. 108-114). On redirect examination appellant again emphasized that he appeared of his own free will at the station on both occasions since he had nothing to hide (Tr. 116-117).

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[6] This answer related to the incident occurring on August 9 (Tr. 101).

Eugene Dennis, Sr., appellant's father, basically corroborated appellant's story that he was in the house on the evening of August 8 and 9 (Tr. 123-127). One discrepancy occurred on cross-examination. Appellant had testified that he went immediately to his room to watch television upon completion of the work on his car (Tr. 120); his father, however, testified that appellant stayed downstairs with his parents and watched television until he fell asleep there (Tr. 131). Mrs. Lucille Dennis, appellant's mother, also essentially corroborated appellant's alibi for the August date, although she too stated that appellant remained downstairs watching television until he retired (Tr. 138).

Noel Green testified that on September 11 he aided appellant in cleaning the floors at Mrs. Munderay's home[7] (Tr. 144). On cross-examination, Mr. Green acknowledged that he accompanied appellant to the police station on October 2. He was then asked whether he told Detective Thompson at that time that on September 11 he and appellant "had been driving around all day long in his [appellant's] car and you couldn't recall where you were," to which Mr. Green replied that he did not remember making such a statement (Tr. 149-150).

Detective Thompson testified on rebuttal[8] that he had invited appellant to the police station on September 27 to discuss the two incidents, particularly the September 11 assault which had involved his automobile. After Thompson showed appellant the police reports relating to both offenses, appellant related that he could not specifically recall what he was doing on September 11, but he did remember that he spent the day driving around in his own car with Mr. Green (Tr. 164-166). Detective Thompson further testified that on October 2, after he advised appel-

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[7] Mrs. Ellen Munderay also testified on appellant's behalf as an alibi witness for September 11 (Tr. 151-155). Appellant also presented a witness to testify to his reputation for peacefulness (Tr. 157-158).

[8] Prior to the testimony of Detective Thompson concerning the statements made by appellant at the police precinct, the prosecutor advised the trial court of the nature of the expected rebuttal evidence. Appellant's counsel specifically stated that he had no objection to the use of such testimony (Tr. 159-160).

lant of his rights and appellant signed a statement that he understood those rights, appellant again told him that he was in the company of Mr. Green all day on September 11 (Tr. 167-168). At the same time Detective Thompson talked to Mr. Green, who accompanied appellant to the precinct, and Mr. Green corroborated appellant's story of their being together and driving around (Tr. 168-169).

ARGUMENT

I. The trial court did not err by excluding the alleged confessions of appellant's deceased brother that he and not appellant had committed the crimes.

(Tr. 34-65)

Appellant argues that the trial court erred by excluding testimony from various defense witnesses that appellant's brother, Charles Dennis, confessed to the crimes for which appellant was on trial about two weeks before he committed suicide. Prior to the presentation of appellant's case, the trial court heard the testimony of appellant's father, mother and sister-in-law and of appellant himself, out of the presence of the jury, concerning the alleged confessions Charles Dennis had made to each of them in which he identified himself as the perpetrator of the crimes for which appellant was being tried. Although the prosecutor initially stated that he would have no objection to such testimony, he thereafter changed his mind and entered an objection, which the trial court sustained (Tr. 34-65). Appellant now claims that the ruling of the trial court was erroneous.

Appellant contends that since the law has recognized the admissibility of declarations against pecuniary interest as an exception to the hearsay rule, this Court should now expand that exception to include declarations purported to be against an individual's penal interest. Assuming *arguendo* for the moment that declarations against one's penal interest should be recognized as an exception, it is not clear that the declarations by appellant's brother in the instant case were in any manner against his penal

interest. The brother, Charles Dennis, allegedly confessed to the crimes for which appellant was convicted to appellant, his mother and father, and his own wife; none of the alleged confessions, however, were made in the presence of any other party. In the first instance, it is difficult to imagine that any of these persons would inform the law enforcement officials of the confession and testify against Charles, and indeed, the testimony of each of them clearly revealed that no one acted upon the information to the benefit of appellant, even though he was incarcerated at the time they allegedly received the information. Second, and more importantly, it is far from certain that appellant's brother, assuming he made such confessions, ever anticipated being tried for the crimes or taking the stand subject to the laws of perjury, since shortly after the alleged confessions he committed suicide. Considered with the fact that the alleged confessions were made only to family members, the suicide negates the most essential element of a declaration against interest, *i.e.*, reliability. Unless it can shown that the declarant had no motive to falsify his testimony, the declarations, whether against pecuniary or penal interest, are not admissible. *See Gichner* v. *Antonio Troiano Tile & Marble Co.*, 133 U.S. App. D.C. 250, 410 F.2d 238 (1969); *cf. United States* v. *Alexander*, 139 U.S. App. D.C. 163, 430 F.2d 904 (1970).

Even assuming *arguendo* that the alleged confessions were against the penal interest of appellant's brother, it is clear that such statements are inadmissible. *Donnelly* v. *United States*, 228 U.S. 243 (1913); *Scolari* v. *United States*, 406 F.2d 563 (9th Cir. 1969). Just a few months ago this Court recognized that *Donnelly* was still the law and expressly declined an invitation to "overrule" it. *United States* v. *Alexander, supra.* The instant case in this respect is indistinguishable from *Alexander*, and accordingly we ask the Court to follow *Donnelly* as it did in *Alexander*.[9]

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[9] Much of the evidence of the alleged confessions of appellant's brother managed to come out before the jury in spite of the trial court's ruling. Regarding the August 9 robbery, when asked on cross-examination whether

II. The trial court did not err by failing to hold an identification hearing prior to trial *sua sponte* where appellant expressly waived such a hearing, and in any event there was no error in the identification.

(Tr. 20, 67-68, 86, 87, 101, 107, 109-110, 112, 165-167)

Appellant contends that the trial court committed error by not holding a hearing out of the presence of the jury to determine whether the identification process culminating in the complainant's in-court identification was in any manner tainted and thus inadmissible. The record reveals that the investigating officer requested appellant to appear at the precinct, where his photograph was taken. Thereafter, within seventeen days of the second offense, the police officer brought this picture of appellant, along with twelve others, to the complainant, who identified appellant from the photo as the individual who had perpetrated the two crimes. After his arrest appellant was identified in a lineup by the complainant (Tr. 20).

Initially we note that this is not a case where appellant merely failed to object to the identification evidence at trial and on appeal is asserting a claim for the first time. Had that been the case, this Court would be "reluctant to consider [the *Wade* claim] for the first time on appeal," *Solomon* v. *United States,* 133 U.S. App. D.C. 103, 106, 408 F.2d 1306, 1309 (1969), but it might be disposed to do so if appellant could establish plain error under FED. R. CRIM. P. 52(b). *Cf. United States* v. *Waterstraat,* D.C. Cir. No.

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he knew if his brother owned a pistol, appellant responded, "Evidently so he had to have a pistol, he told me he stuck the man up, so I guess he did have a pistol" (Tr. 101). As to the September 11 incident, after the complainant had testified that his assailant had escaped in an automobile and that the tag numbers were obtained and later traced, appellant stated on direct examination that he never drove his automobile after Labor Day (Tr. 86), but that his brother had access to it (Tr. 87) and had the car on September 11 (Tr. 107). Additionally, the alleged confessions of appellant's brother could have had little effect since the complainant identified a picture of the brother, at the request of appellant's counsel, and stated that the person in the picture committed the August 9 robbery in company with appellant (Tr. 67-68). Thus it was immaterial whether or not he confessed, since appellant would still not be exculpated by such confessions.

22,708, decided November 14, 1969 (unpublished). In the case at bar, however, the *Wade-Stovall* issue was raised and was affirmatively and assiduously waived. Contemplating appellate inspection of the issue, the prosecutor proffered what a pre-trial evidentiary hearing would reveal were it to be held. Appellant's trial counsel tactically determined to forego lengthy consideration of a matter he had personally investigated and determined not to warrant judicial investigation.

> The defense was apprised in advance of the identification evidence the Government proposed to put before the jury, and this included a full statement of the circumstances of pretrial confrontation. The defense appeared to be satisfied with the prosecution's factual representations, and to believe that appellant had been exposed to no injury on this score. At no time did it object to the evidence in question, or seek an evidentiary inquiry out of the jury's presence. . . . *United States* v. *Waterstraat, supra,* slip op. at 2.

Having become cognizant of the circumstances surrounding the pre-trial identifications from the Government's plenary proffer and through discussions with the prosecutor prior to the time of trial (Tr. 19-20), appellant's counsel unequivocally expressed his belief that no challenge was necessary to the identification procedure on constitutional grounds.[10] While this Court has opined that it would be in the best interests of all parties for the trial court to inquire personally, *Solomon* v. *United States, supra,* 133 U.S. App. D.C. at 106, 408 F.2d at 1309, we submit that in the case at bar, where appellant's counsel expressly stated his considered opinion that a pretrial identification hearing was unnecessary, the trial court was justified in not pursuing the matter further. *See also United States* v. *Washington,* D.C. Cir. No. 23,059, decided December 28, 1970, slip op. at 9.[11]

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[10] *United States* v. *Wade,* 388 U.S. 218 (1967); *Stovall* v. *Denno,* 388 U.S. 293 (1967).

[11] The record clearly demonstrates in any event that the photographic identification was not impermissibly suggestive and violative of due process.

As a corollary to his argument contending that the trial court erred by not holding an identification hearing out of the presence of the jury, appellant also complains for the first time on appeal about the propriety of the taking and use of his picture.[12] We note initially that there were no objections at trial to any of the testimony regarding the identification of appellant by photographs, nor to the manner in which the photograph was obtained, and therefore we submit that this belated claim should not now be considered. *Segurola* v. *United States,* 275 U.S. 106 (1927); *Scott* v. *United States,* 115 U.S. App. D.C. 208, 317 F.2d 908 (1963). In any event, it is clear that no objection was called for. The transcript reveals that the police officer called appellant and invited him to the precinct. Appellant testified on cross-examination:

Q. Who accompanied you downtown?
A. No one.
Q. But that——
A. Of my own free will.
Q. You went down of your own free will?
A. Yes (Tr. 109-110).

Simmons v. *United States,* 390 U.S. 377 (1968); *United States* v. *Williams,* 137 U.S. App. D.C. 231, 421 F.2d 1166 (1970); *United States* v. *Hamilton,* 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969). Assuming *arguendo* a due process violation, the record supports a finding of independent source. *United States* v. *Sera-Leyva,* 139 U.S. App. D.C. 376, 433 F.2d 534 (1970); *United States* v. *Kemper,* —— U.S. App. D.C. ——, 433 F.2d 1153 (1970); *Williams* v. *United States,* 133 U.S. App. D.C. 185, 409 F.2d 471 (1969).

[12] Evidently appellant does not principally rely on the absence of counsel at either the taking of the photograph or its exhibition, with a group of other photographs, to the complainant. However, appellant misreads the testimony of Detective Thompson's statement about the picture. After being asked to identify two photographs, Government Exhibits Nos. 2 and 3, taken of appellant on October 2 and September 27, respectively, Detective Thompson stated, "These are photographs of the defendant sitting out there with the defense attorney" (Tr. 164). It is clear from the other testimony of the detective (Tr. 165-167) and from the testimony of appellant (Tr. 109-110, 112) that no attorney at any time accompanied appellant to the precinct, notwithstanding appellant's present suggestion to the contrary. It is equally clear from the context that Detective Thompson's statement mentioning defense counsel was merely an in-court identification of appellant, who at the time was seated next to his attorney.

In any event, the taking of appellant's picture by the police was not a sufficient "intrusion" upon his person or privacy to be considered violative of the Fourth Amendment. *Cf. Von Sleichter* v. *United States,* 267 A.2d 336, 339 (D.C. Ct. App. 1970). Properly analogized, the photographic procedure was akin to fingerprinting, since both are reliable and involve minimal intrusion. In *Davis* v. *Mississippi,* 394 U.S. 721 (1969), the Supreme Court held that fingerprinting a defendant during a period of illegal detention violated the Fourth Amendment. This Court reached the same result in *Bynum* v. *United States* [*Bynum I*], 104 U.S. App. D.C. 368, 262 F.2d 465 (1959). *Bynum* and *Davis* do not necessitate reversal here, however, because in this case the detention of appellant for the brief period while the photograph was taken was legal, *cf. Bynum* v. *United States* [*Bynum II*], 107 U.S. App. D.C. 109, 274 F.2d 767 (1960), and particularly so where the evidence overwhelmingly established that appellant voluntarily participated. There was in fact no evidence whatsoever to the contrary. Had probable cause existed for appellant's immediate arrest, there is no question that a full search, in addition to the photographic procedure, would have been permissible. The brief intrusion, however, was not based on probable cause to arrest but upon reasonable suspicion. The question becomes, in these circumstances, whether the limited intrusion was consistent with the Fourth Amendment. We submit that it was.

The Fourth Amendment proscribes only *unreasonable* searches and seizures. The Supreme Court in *Terry* v. *Ohio,* 392 U.S. 1 (1968), stressed the requirement of reasonableness in rejecting a "rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment," which permits searches and seizures only upon probable cause, because that model "obscures the utility of limitations upon the scope, as well as the initiation, of police action." 392 U.S. at 17. Police activity short of an arrest and full search based on less than probable cause is thus neither completely foreclosed by the Fourth Amendment

nor exempted from its requirement of reasonableness. The "central inquiry" in every case is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Id.* at 19. This inquiry, of necessity, involves a balancing of the "nature and extent of the governmental interests involved," *id.* at 22, against "the nature and quality of the intrusion of individual rights." *Id.* at 24. *Cf. Camara* v. *Municipal Court,* 387 U.S. 523, 534-537 (1967); *Castillo-Garcia* v. *United States,* 424 F.2d 482 (9th Cir. 1970); *Stassi* v. *United States,* 410 F.2d 946 (5th Cir. 1969).

The Supreme Court in *Davis* v. *Mississippi, supra,* recognized the slight personal intrusion which is occasioned by the comparable fingerprinting process:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. . . . Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." 394 U.S. at 727.

In the same way, we submit, the minimal intrusion required for photographing in the instant case was reasonable. Appellant's automobile had been utilized in the perpetration of a crime. Not only for the protection of appellant as the registered owner of the automobile but also for effective crime detection, it was necessary that the complainant have an opportunity to exonerate or inculpate appellant, and the exhibition of a series of photographs was the easiest and most reasonable method for doing so under the circumstances. The inconvenience was, in fact, less than would probably be involved in fingerprinting. Appellant was not "booked" or otherwise processed at the police precinct and was detained only momentarily; the photograph was taken within a relatively short span of time after his voluntary

appearance at the precinct. This modest intrusion upon appellant's privacy, even assuming *arguendo* (contrary to the evidence of record) that appellant did not consent to it and assuming further (again contrary to the record) that appellant did not waive objection at trial, was thus completely consistent with the Fourth Amendment's requirement of reasonableness as discussed in *Terry* and *Davis*.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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